No. 86-42

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G. D. SEARLE & COMPANY,

Petitioner,

v.

SUSAN COHN and WALTER COHN, her husband, and ATTORNEY GENERAL OF NEW JERSEY, IRWIN KIMMELMAN,

Respondents.

REPLY TO OPPOSITIONS TO PETITION FOR CERTIORARI

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The separate Oppositions of the New Jersey Attorney General ("New Jersey Op.") and of plaintiffs Walter and Susan Cohn ("Pl. Op.") merely underscore the importance of review of the Third Circuit's decision in this case. Respondents' own arguments vividly demonstrate that the Third Circuit's decision conflicts with the holdings of at least five other courts of appeals and that a decision of the question will (conservatively) affect hundreds of other cases. Respondents' sole response is to argue (Pl. Op. p. 11 & New Jersey Op. pp. 12-13) that the Third Circuit is right and that Judge Friendly and five other circuits are wrong.

First, respondents do not dispute that the Third Circuit held that the principles of "retroactivity" of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), can permit the prospective enforcement of a state statute that unconstitutionally discriminates

against out-of-state corporations in yet-to-be filed and pending cases in which there have been no proceedings of substance on the merits. Respondents also do not dispute that the Third Circuit so held, *despite* its recognition that the question whether the Tolling Statute could validly be applied to such corporations "was in doubt until well after plaintiffs filed their complaint" (App. 11a) (because the lower New Jersey courts were divided and the overwhelming majority of other courts had rejected plaintiffs' position)[1] and that the subsequent substantive Commerce Clause holding merely applied "well settled precedents." (App. 9a).

Respondents cannot alter the fact that the Second Circuit, the First Circuit, the Seventh Circuit, and other courts of appeals have all held that these factors foreclose a holding of "nonretroactivity" and have rejected the Third Circuit's contrary position. *See* Petition, pp. 14-17. When, as here, a decision represents no more than the application of a "recognized legal principle . . . to a situation not precisely covered by

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[1] Plaintiffs (pp. 7-8, 13-14) correctly state that these other decisions narrowly construed state tolling statutes to avoid constitutional problems and that, while courts had previously expressed concerns about the unwarranted discrimination against out-of-state corporations, none had expressly discussed the Commerce Clause. However, plaintiffs are incorrect that this fact can support the Third Circuit's holding.

First, the division in authority and the fact that the question was expressly reserved by the New Jersey Supreme Court meant that there was no possibility of "justifiable *societal* reliance" on the applicability of the Tolling Statute to out-of-state corporations and no basis whatever for denying "retroactive" effect to the decision holding such applications invalid. *Simpson* v. *Director,* 681 F.2d 81, 85-86 (1st Cir. 1982) (Coffin, J.) (emphasis in original); *see also Kremer* v. *Chemical Constr. Corp.,* 623 F.2d 786, 789-90 (2d Cir. 1980) (Friendly, J.). Indeed, plaintiffs do not dispute that neither they nor anyone else in fact relied on the Tolling Statute in failing to file suit in a timely fashion. *Compare* Petition 7-8 & n.8, *with* Pl. Op. pp. 15-16. Second, because the subsequent Commerce Clause decision merely applied well recognized principles, "non-retroactivity" is impossible in all events. *See, infra.*

previous decisions," these other courts hold that there "is no occasion to consider the other two [*Chevron* factors]" and "engage in the [*Chevron*] balancing process" and that the decision applies to all pending cases as a matter of law.[2] As Judge Friendly explained in an opinion for the Second Circuit, the basis for the rule in these circuits is their understanding of *Chevron* and other decisions of this Court:

> "This [position] finds support not only in the language of the *Chevron* opinion itself, 404 U.S. at 106, ("the decision to be applied nonretroactively *must* establish a new principle of law") (emphasis supplied), . . . but also by other Supreme Court decisions analyzing questions of retrospectivity. See, e.g., *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968) (decisions applied retrospectively because they "did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks"); *Desist* v. *United States,* 394 U.S. 244, 248 (1969) (retrospectivity analysis appropriate where decision was "a clear break with the past"); *Gosa* v. *Mayden,* 413 U.S. 665, 673 (1973) (same for "a decisional change in attitude that had prevailed for many decades"). Six months after writing *Chevron,* Justice Stewart wrote that "[a]n issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law." *Milton* v. *Wainwright,* 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting; the majority did not reach the issue). . . . Any broader reading of *Chevron* would require courts to engage in the balancing process demanded by the second and third factors whenever a recognized legal

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[2] *Kremer* v. *Chemical Constr. Corp.*, 623 F.2d 786, 789 (2d Cir. 1980) (Friendly, J.), *aff'd,* 456 U.S. 461 (1982); *accord, Simpson* v. *Director,* 681 F.2d 81, 85-87 (1st Cir. 1982) (Coffin, Jr.); *MCI Telecommunications, Inc.* v. *AT&T,* 708 F.2d 1081, 1136 (7th Cir. 1983).

> principle, here *res judicata,* had been applied—or not applied—to a situation not precisely covered by previous decisions."

Kremer v. *Chemical Constr. Corp.,* 623 F.2d 786, 789 (2d Cir. 1980) (some citations omitted).

The New Jersey Attorney General's (pp. 12-13) and plaintiffs' (p. 11) sole response to Judge Friendly, and the courts of appeals that agree with him, is to argue that the Third Circuit's interpretation of *Chevron* is correct and that the other circuits' interpretations of *Chevron* are wrong. But the resolution of these conflicts is a question for this Court. This is especially so because respondents acknowledge that the Third Circuit's approach has meant that every decision of this Court has generated a "second round of litigation" over its retroactivity under wholly *ad hoc* standards (*see* New Jersey Op. p. 14) and a decision of this Court could end this needless litigation. *See* Petition 12-13 & n.10.

Second, the New Jersey Attorney General and plaintiffs do not dispute that *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239, 247 (1931); *Loretto Winery Ltd.* v. *Duffy,* 761 F.2d 140, 141 (2d Cir. 1985), and other cases have uniformly held that statutes that are held unconstitutionally to discriminate against out-of-state corporations (or others) cannot be enforced *after* they are invalidated, without regard to the *Chevron* criteria. Plaintiffs' argument (pp. 11-12) that these cases did not involve or discuss "retroactivity" misses the point.[3] These cases did involve and discuss the only issue presented here—whether a statute that unconstitutionally discriminates against out-of-state corporations can be given effect *after* the statute has been invalidated—and they reject the Third Circuit's holding.

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[3] Similarly, the cases cited by the New Jersey Attorney General (pp. 12-13) do not involve unconstitutional discrimination or the prospective enforcement of statutes that effect it; and they are thus irrelevant to this aspect of the Petition.

Plaintiffs also argue (p. 13) that the Second Circuit's decision in *Industrial Consultants, Inc.* v. *H.S. Equities, Inc.*, 646 F.2d 746, 748-49 (1981), rested solely on a state constitution and is therefore not in conflict with the Third Circuit's federal constitutional holding. Plaintiffs have misread this case. The Second Circuit declined to address the question of the "retroactivity" of the state constitutional holding because the Tolling Statute also had been held to violate the Equal Protection Clause of the Federal Constitution. *Id.* at 748-49. This latter fact, in the Second Circuit's view, precluded the enforcement of the unconstitutional Tolling Statute in that case, without regard to the *Chevron* criteria, because "a federal court will not give effect, in either a diversity or nondiversity case, to a state statute that violates the Constitution of the United States." *Id.* at 749 (citations omitted). The point was so clear to the Second Circuit that no further reasoning was required.

Finally, the New Jersey Attorney General (p. 12) acknowledges that the Third Circuit's decision affects an indeterminate number of persons. However, plaintiffs (p. 17) now dispute the statements in the Petition that the Third Circuit's ruling affects "hundreds" of pending cases and an indeterminate number of future cases. But these estimates are conservative. In the Third Circuit, *amicus curiae* the Plaintiffs Asbestos Association stated that there are approximately 1000 such cases (listing 736 by name), and asserted that virtually all would be affected by the decision in this case.[4] On this basis, plaintiffs urged that these representations be considered by the Third Circuit.[5] It is extraordinary that plaintiffs would seek to argue to the contrary now.

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[4] Affidavit of Robert H. Jaffe In Support Of Motion To Permit The Late Filing Of An *Amicus* Brief By Asbestos Plaintiffs Association (filed March 29, 1985); *Amicus Curiae* Br. of Asbestos Plaintiffs Association, pp. 1-2 (April 22, 1985).

[5] Plaintiffs-Appellants Brief In Support Of Motion Of Asbestos Plaintiffs For Leave To Participate As *Amicus Curiae* (dated April 16,

(Footnote continued on following page)

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 19, 1986

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(Footnote continued from preceding page)

1985). Contrary to plaintiffs' insinuation (p. 17), Searle has nev disputed that each of these suits may well be barred by the two-ye limitations period if the Tolling Statute cannot be interposed. A Searle previously argued is that any unique facts of 1000 other cas should not have been injected into the Third Circuit's consideration this case.